

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORY L. THOMPSON,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 240849

Wayne Circuit Court

LC No. 01-008481-01

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b, entered after a bench trial. We affirm.

Defendant was charged with armed robbery, carjacking, MCL 750.529a, carrying a concealed weapon, and felony-firearm. Larry Manley testified that defendant robbed him at gunpoint of cash and a vehicle he was driving, and that defendant's confederate pointed a gun at Roosevelt Hicks, Manley's cousin. Manley indicated that later in the evening he saw defendant in police custody, and that he and Hicks identified defendant as a participant in the robbery. A search of defendant's vehicle revealed a semiautomatic handgun beneath the driver's seat. Defendant's fiancée testified that defendant remained at home on the evening of the incident and later drove his vehicle to the location where her vehicle had malfunctioned. Hicks denied that he was on the scene when defendant was arrested.

The trial court convicted defendant of armed robbery, carrying a concealed weapon, and felony-firearm, second offense, but acquitted him of carjacking. The trial court observed that the testimony given by Manley and Hicks was inconsistent in some respects, and that the vehicle alleged to have been taken by defendant was never located. The trial court concluded that the elements of carjacking were not proven beyond a reasonable doubt.

A trial court in a bench trial must render logical verdicts, and is precluded from exercising a jury's capacity for lenity. *People v Hutchinson*, 224 Mich App 603, 605-606; 569 NW2d 858 (1997). Verdicts are inconsistent if the findings of fact underlying the verdicts are inconsistent. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). We review a trial court's findings of fact for clear error and conclusions of law de novo. MCR 2.613(C).

To establish the elements of armed robbery, the prosecution must show: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) that the taking occurred while the defendant was armed with a dangerous weapon. MCL 750.529; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To establish the elements of carjacking, the prosecution must show that: (1) the defendant took a motor vehicle from another person; (2) the defendant did so in the presence of that person, a passenger, or any person in lawful possession of the vehicle; and (3) the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. MCL 750.529a(1); *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998).

Defendant argues that he is entitled to a reversal of his convictions because the trial court's verdicts of guilty of armed robbery and not guilty of carjacking were logically inconsistent. We disagree. The trial court, sitting as the trier of fact, was entitled to judge the credibility of the witnesses and to determine what testimony to accept and what to reject. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). A trier of fact may accept portions of a witness's testimony and reject other portions. See CJI2d 2.6(1). Manley's testimony regarding defendant's actions established the elements of armed robbery, *Carines*, *supra*, and was not contradicted. The trial court's findings as to that offense were not clearly erroneous. MCR 2.613(C). However, the evidence regarding the alleged carjacking was somewhat inconsistent and inconclusive. When defendant was apprehended, he was in his own vehicle. The vehicle alleged to have been taken from Manley was never recovered. The trial court did not clearly err in finding that the prosecution failed to prove, beyond a reasonable doubt, that defendant took a vehicle from defendant. MCR 2.613(C); *Davenport*, *supra*. The factual findings underlying the trial court's verdicts of guilty of armed robbery and not guilty of carjacking were not inconsistent. *Smith*, *supra*.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by failing both to impeach Manley with inconsistent statements from his preliminary examination testimony, and to emphasize to the trial court that Manley and Hicks gave contradictory testimony regarding Hicks' on-site identification of him as the perpetrator of the armed robbery. We disagree. Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Counsel's decisions regarding what evidence to present are presumed to be matters of trial strategy. *Rockey*, *supra*. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant points to no prior inconsistent statements made by

Manley regarding identification of the perpetrator of the armed robbery. The trial court was aware of the contradiction between Manley's testimony and Hicks' testimony as to whether Hicks was present and identified defendant to the police. Defendant has failed to demonstrate prejudice in that he has not shown that, but for any error by counsel, it is reasonably probable that the result of the proceedings would have been different. *Carbin, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly